



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 25, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2003-2795

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 180028.

The City of Austin's Civil Service Commission (the "Commission") received a request for "any disciplinary reports on Austin firefighters and Austin police officers during the month of January 2003." We acknowledge our receipt of comments submitted by the law firm of the requestor's employer, the Austin American-Statesman, as permitted by the Act. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). You assert a portion of the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note you seek a decision from this office only with respect to the submitted information, which consists of one disciplinary record. You do not indicate whether the Commission possesses any other responsive documentation. If other information responsive to the request exists, we assume the Commission has released it to the requestor. If the Commission has not released such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we note that in your initial letter to this office you claimed only section 552.101 as an exception to required public disclosure of the information at issue. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). In this case, you claim section 552.108 in your hand-delivered letter, which we received on February 28, 2003. You should have asserted this exception no later than February 24, 2003. Consequently, we conclude because the Commission asserted section 552.108 in an untimely manner, it did not comply with section 552.301(b). *See* Gov't Code § 552.301(b) (requiring governmental body to state applicable exceptions no later than the tenth business day after the date of receiving the written request).

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists when some other source of law makes the information confidential or the information impacts third party interests. Open Records Decision No. 150 at 2 (1977). Section 552.108 of the Government Code, a discretionary exception under the Act, generally does not qualify as a compelling reason to withhold information from the public. *See* Open Records Decision No. 586 (1991) (providing that a governmental body may waive section 552.108 of the Government Code).

However, this office has determined that the need of another governmental body to withhold requested information may provide a compelling reason for nondisclosure under section 552.108. Open Records Decision No. 586 (1991). In this instance, you state the district attorney *plans* to present this case to the grand jury. Yet, you provide no documentation, such as a letter from the district attorney stating that the district attorney

wants to withhold the information.¹ Therefore, we find the Commission has not provided this office with a compelling reason to withhold the submitted information under section 552.108 based on the need of the district attorney. *See* ORD 586. Thus, we conclude the Commission may not withhold the information under section 552.108 because the Commission has waived this provision of the Government Code.

Further, we note the submitted documentation contains information subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information pertains to a completed investigation conducted by the Officer Involved Crime Unit and the Internal Affairs Division. Therefore, as section 552.022(a)(1) makes the contents of the submitted document expressly public, the Commission may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code.

You contend section 552.101 of the Government Code excepts the highlighted portion of the submitted document from public disclosure. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Citing *Garrity v. New Jersey*, 385 U.S. 493 (1967), you contend the Commission must redact the highlighted statements made by the subject of the submitted information "because the officer has an interest in the nondisclosure of the statements." *Garrity v. New Jersey*, 385 U.S. 493 (1967). You argue *Garrity* provides the officer at issue with a Fifth Amendment privilege in not having incriminating statements derived from an internal affairs investigation used against him in a pending criminal prosecution. You explain if the Commission releases the statements, people involved in the prosecution, including grand and petit jurors, may read these statements, which "may slant their impressions of the case." We disagree with your rationale and application of *Garrity* to this particular case. In *Garrity*, the officers made incriminating statements during an

¹ We note section 552.108 protects a law enforcement agency's interest. Thus, this office requires a representation from the law enforcement entity that it seeks to withhold the information because release would interfere with the detection, investigation, or prosecution of crime.

investigation by the Attorney General of New Jersey under the threat of a forfeiture of office statute. *Garrity*, 385 U.S. at 494-95. During subsequent criminal proceedings, the lower court admitted some of these statements into evidence, holding the officers gave the statements voluntarily. *Id.* at 495 n.2. Ultimately, the Court held self-incriminating statements obtained under a threat of job forfeiture and subsequently used in criminal proceedings violated the officers' Fifth Amendment privilege against self-incrimination. *Id.* at 500. *Garrity* is inapplicable here because the statements are released in response to a request under the Public Information Act (the "Act") and not used as evidence in a criminal prosecution. *See id.* at 495. Therefore, we find *Garrity* provides no basis for withholding the statements at issue. Accordingly, we conclude the Commission may not withhold the highlighted portion of the submitted information under section 552.101 of the Government Code.

In summary, the Commission must release the submitted information, in its entirety, as the Commission has not established the applicability of section 552.101 of the Government Code and it has waived section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

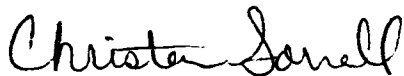
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 180028

Enc: Submitted documents

c: Ms. Claire Osborn
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)

Mr. William Christian
Graves, Dougherty, Hearon & Moody
515 Congress Avenue, Suite 2300
Austin, Texas 78701
(w/o enclosures)